No. 80-84

IN THE

Supreme Court of the United States

October Term, 1980

ANDERSON BROS. FORD and
FORD MOTOR CREDIT COMPANY,

Petitioners,

vs.

OLGA VALENCIA and
MIGUEL GONZALEZ,

Respondents.

On a Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

BRIEF OF INDIAN PUEBLO LEGAL SERVICES, INC. AS *AMICUS CURIAE*

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BRIEF OF INDIAN PUEBLO LEGAL SERVICES, INC. AS *AMICUS CURIAE*

Indian Pueblo Legal Services, Inc. respectfully submits this Brief as *Amicus Curiae* in support of the Respondents, filed upon the written consent of all parties pursuant to Rule 36.2 of the Rules of this Court.

INTEREST OF *AMICUS CURIAE*

Indian Pueblo Legal Services, Inc. (hereinafter "IPLS") is a non-profit New Mexico corporation funded by the Legal Services Corporation (hereinafter "LSC") pursuant to the LSC Act, 42 U.S.C. Sec. 2996 *et. seq.* LSC was established by Congress to "provide legal assistance to those who face an

economic barrier to adequate legal counsel . . . and [to] assist in improving opportunities for low-income persons . . ." 42 U.S.C. Sec. 2996(3).

IPLS has four offices in New Mexico and provides legal services to all of the Pueblo Indians of New Mexico. The Pueblos have retained their unique and ancient cultures throughout centuries of change around them. Pueblo Indians have had difficulty adjusting to changes, particularly in the area of consumer affairs. They have had many problems dealing effectively with unscrupulous sellers and creditors who find the historical bartering economy of the Pueblo Indians easy prey to high pressure sales and credit practices. Even in regard to those creditors who do not consciously seek to exploit the Pueblos, this rich heritage, a blessing in so many other contexts, places the Pueblos at a tremendous disadvantage as they grapple with the complexities and unfamiliarity of mainstream American culture.

IPLS serves in the role of consumer advocate, attempting to equalize to some extent the disparate bargaining position between Pueblo Indian and creditor. It is in this role that IPLS participates as *Amicus Curiae* in support of Respondents Olga Valencia and Miguel Gonzales.

To exist as an Indian in New Mexico, a state renowned for its lack of public transportation, a vehicle is a necessity both for travel to urban areas to purchase food and clothing and to gather wood to provide heat for homes. Indian people often finance their vehicles through national creditors such as Petitioner Ford Motor Credit Company and General Motors Ac-

ceptance Corporation. (It is these creditors which employ the assignment clause presented for review in the present lawsuit.)

The clients whom IPLS serves have no awareness that their creditors receive the returned or unearned insurance premiums which they have purchased for their vehicle. Only by enforcement of the requirements of the Truth-in-Lending Act and Regulation Z will Pueblo Indian people be given the opportunity to comparison shop for the credit they seek or to become aware of the extent of the obligations which they have incurred and to which they bind themselves.

ARGUMENT

SUMMARY OF ARGUMENT

The substantive issue before this Court is not addressed here by *Amicus*. Rather, this Brief discusses only the second question presented by Petitioners (hereinafter "Creditors") concerning whether the ruling on the merits should be applied fully retroactively or, as in *Cipriano v. Houma*, 395 U.S. 701 (1969), applied to all pending actions and to those which could be brought within the applicable one year statute of limitations.

The position of *Amicus* is that any judgment should be made fully retroactive. To permit creditors to avoid liability to consumers by prospective only application would be to subvert the Congressional intent of requiring full disclosure of the costs and terms of credit. Prospective only application would render totally ineffective and useless the private en-

forcement mechanism established by Congress to hold creditors who have violated the Act accountable to those consumers against whom a violation has occurred.[1]

The question before this Court is whether, under the Truth-in-Lending Act[2] (hereinafter "the Act") and Federal Reserve Board Regulation Z[3] (hereinafter "Regulation Z"), the assignment of returned or unearned premiums of physical damage insurance creates a security interest which must be disclosed. If, as argued by Respondents Olga Valencia and Miguel Gonzales (hereinafter "Consumers"), such an assignment does create a security interest which was improperly disclosed, then Creditors have violated the Act and Regulation and are subject to the damage provision therein.[4]

Creditors and *Amici Curiae* Consumer Banker's Association, General Motors Acceptance Corporation and the Na-

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1 15 U.S.C. Sec. 1640(a) created a force of "private attorneys general" charged with enforcing compliance with the requirements of the Act. See *McGowan v. King, Inc.*, 569 F.2d 845, 848 (5th Cir. 1978); *Murphy v. Household Finance Corp.*, 560 F.2d 206, 210 (6th Cir. 1977); *Hannon v. Security National Bank*, 537 F.2d 327, 328 (9th Cir. 1976); *White v. Arlen Realty and Development Corp.*, 540 F.2d 645, 649 (4th Cir. 1975); *Sosa v. Fite*, 498 F.2d 114, 121 (5th Cir. 1974); and *Thomas v. Myers-Dickson Furniture Company*, 479 F.2d 740, 748 (5th Cir. 1973).

2 15 U.S.C. Sec. 1601 *et seq.*

3 12 C.F.R. Part 226

4 15 U.S.C. Sec. 1640(a) provides that if any violation of the Act is found, a creditor is liable to the consumer for twice the finance charge but not less then $100 nor more than $1,000, plus attorneys fees and costs.

tional Consumer Finance Association (hereinafter "Bankers") argue that if Creditors are found by this Court to have violated the Act, the judgment of this Court should be applied prospectively only, except as to the Consumers herein.[5] If Creditors' and Bankers' position is accepted by this Court, the effect would be to deny to all persons against whom a violation has occurred the statutory damage award provided in the Act. The Congressional intent of private enforcement of the Act would be thwarted, thereby providing an incentive to creditors throughout the country to ignore the explicit advice of the staff of the Federal Reserve Board and instead to gamble that that advice will be rejected by the judiciary.

Creditors and Bankers cite and apply the three pronged test formulated by this Court in *Chevron Oil v. Huson*, 404 U.S. 97 (1971), to support their contention that a judgment adverse to them should be applied prospectively only. In actuality as discussed below, the *Chevron Oil* test, if applied, only reinforces Consumers' position that the decision of this Court should be given full retroactive effect.

Creditors asked the District Court to apply its holding adverse to them prospectively only in a separate Motion for Rehearing after judgment was entered. The burden was on Creditors to prove reliance and the separate elements necessary for prospective only application, yet Creditors produced absolutely no evidence in support of their position, and thus the record does not contain any facts relevant to this analy-

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[5] See Section III, p.34 of Brief of the Petitioners, and Section III, p.21 of Brief of Bankers.

sis. The *Chevron Oil* test nevertheless would hinge on the application of critical facts absent here: the reliance by Creditors on clear past precedent supporting their position and equitable considerations mitigating against full retroactive effect.

There has never existed clear, past precedent which supports Creditors' position on the merits and upon which they could have relied. As early as 1970, the rule that the right to receive returned insurance premiums must be disclosed as a security interest was enunciated by the staff of the Federal Reserve Board.[6] One year prior to the date of the credit transaction at issue here, the first decision of a federal district court addressing this very question was issued.[7] Not only did that decision sustain Consumers' position that the assignment is a security interest which must be disclosed, but Ford Credit itself was a party to that litigation.

By September 1977, when Consumers purchased their vehicle, there was a split among the three district courts which had decided the question. Still, Creditors did not avail themselves of the provisions of the Act and Regulation Z and request an interpretation from the Federal Reserve Board (hereinafter "FRB" or "Board") to resolve this question. As

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[6] FRB Public Information Letter No. 377 [1969-1974 Transfer Binder] Cons. Credit Guide (CCH) Par. 30,555, July 22, 1970. Letter No. 377 is printed in full in the Addendum of Legal Authorities, *infra*, at p. A-1.

[7] *Edmondson* v. *Allen-Russell Ford, Inc.*, No. C75-940A (N.D.Ga. August 27, 1976), *aff'd* 577 F.2d 291 (5th Cir. 1978), *cert. denied* 441 U.S. 951 (1979).

shown below, if they had done so, Creditors could have fully protected themselves from liability regardless of the position taken by the Board or that subsequently taken by the courts.

Past precedent has never clearly supported Creditors' position on the merits. Most important, however, is the fact that Creditors have never claimed, even in this Court, that they relied on any authority whatsoever.

I. IF THIS COURT FINDS THAT CREDITORS HAVE VIOLATED THE ACT AND REGULATION Z, THAT DECISION SHOULD BE GIVEN FULL RETROACTIVE EFFECT.

A. INTRODUCTION

In their Brief, Consumers argue that the *Chevron Oil* case is not applicable. *Amicus*, while concurring with the position taken by Consumers, will proceed on the assumption that this Court will consider the *Chevron Oil* standards.

In *Chevron Oil v. Huson, supra*, this Court synthesized the case law which had been evolving for over a century. Cases prior to *Chevron Oil* had discussed the merits and requirements of the exceptional circumstances for prospective only application of judicial decisions. *Chevron Oil* formulated a cohesive standard for determining when departure from the normal rule of retroactive application may be appropriate. Three separate factors were to be considered:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . .

> Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." (Citations omitted).

404 U.S. at 106-07.

Bankers have suggested, without citation of any authority,[8] that the Court below improperly required that all three factors be satisfied before a judicial decision be applied prospectively only. The Court below was correct in its holding that prospective only application is the exception to the rule and that all three elements of *Chevron Oil* are to be fully satisfied to deny full retroactive effect of a judgment.[9] Cf. *Hanover Shoe* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 496 (1968). The burden is on the party invoking the *Chevron Oil* doctrine to justify the limited application,[10] and thus creditors must assert and prove all necessary factors.

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[8] Section III(A), pp. 21-22, Brief of Bankers.

[9] See e.g. *Schaefer* v. *First National Bank of Lincolnwood*, 509 F.2d 1287, 1294 (7th Cir. 1975), *cert. den.* 425 U.S. 943 (1976); *Jordan* v. *Weaver*, 472, F.2d 985, 995 (7th Cir.) *rev'd on other grounds sub nom., Adeleman* v. *Jordan*, 415 U.S. 651 (1974).

[10] See *Jimenez* v. *Weinberger*, 523 F.2d 689, 704 (7th Cir. 1975), *cert. den.* 427 U.S. 912 (1976).

Creditors have failed to meet their burden of justifying the limited application.[11] As discussed below, under no factor set forth in *Chevron Oil* are Creditors entitled to prospective only application.

B. CREDITORS HAVE FAILED TO MEET THE *CHEVRON OIL* TEST.

1. A DECISION HERE IN FAVOR OF CONSUMERS WOULD NOT OVERRULE CLEAR PAST PRECEDENT, NOR IS IT AN ISSUE OF FIRST IMPRESSION THAT WAS NOT CLEARLY FORESHADOWED.

Creditors and Bankers argue that the decision below overruled clear past precedent and was not clearly foreshadowed by the state of the law prior to the lower court opinion. Clear expression in the Act and Regulation Z as well as the pronouncements of the FRB and district courts have put all creditors on notice as to the requirements of the law. This notice was given well before the Seventh Circuit ruled in the instant case.

In *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555 (1980), this Court addressed the issue of what weight is to be given pronouncements of the Board. If there is clear expression in the Act or Regulation, the pronouncements of the Board need not be consulted; but if an interstitial gap does

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[11] The Eigth Circuit has, in addition to the Seventh Circuit in the decision below, also ruled that Creditors can meet none of the *Chevron Oil* factors in the case of their defective disclosure of the security interest in insurance premium refunds. *Murphy v. Ford Motor Credit Co.*, 629 F.2d 556, 561 (8th Cir. 1980).

exist, the Board's authoritive statements are to be given deference. The question before the Court in this case is directly addressed by Regulation Z in its definition of "security" and "security interest" contained in 12 C.F.R. Sec. 226.2(gg). A reading of Regulation Z yields the inescapable conclusion that the assignment is a security interest since it secures payment or performance of the contractual obligations. In fact, every court considering the issue which has analyzed the Regulation Z definition in reaching its opinion has found the existence of a security interest, and those courts which have not required disclosure have reached that conclusion on bases other than that the assignment did not create a security interest as defined.[12]

If the clear language of the definition were not sufficient to "foreshadow" that result and if any question whatsoever remained after Regulation Z was promulgated, the FRB staff itself on July 22, 1970, explicitly stated in Letter No. 377, *supra*, that the right to receive unearned insurance premiums and apply them to a loan balance is a security interest which must be disclosed. The situation described in Letter No. 377

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12 *James* v. *Ford Motor Credit Co.*, Civ. No. 78-1806 (10th Cir. 1980), *reh. denied* (10th Cir. 1980), *petition for cert. filed* 49 U.S.L.W. 3333 (U.S. Oct. 20, 1980) (No. 80-640), and *Rounds* v. *Community National Bank in Monmouth*, 454 F.Supp. 883 (S.D.Ill. 1978), have reached independent decisions that the assignment need not be disclosed. *James* did not even analyze the Act or Regulation Z, basing its decision on the recently enacted and inapplicable Truth-in-Lending Simplification Act, and *Rounds* failed to note that Regulation Z addressed the question that the *Rounds* court was attempting to answer.

is directly analogous in all relevant parts to the present situation: The consumer purchases an insurance policy (life insurance in the letter, physical damage insurance in the instant case) in conjunction with the loan, the creditor being designated as owner or assignee of the policy during the term of the loan; in the event of the consumer's default, the creditor has the right to cancel the insurance and receive the refunded premiums; and the creditor has the right and discretion to apply these refunded premiums to the unpaid balance. It is irrelevant that Letter No. 377 deals with life insurance or that the creditor "owns" the insurance policy. What is important is that the creditor, through the assignment or ownership, receives a benefit that helps to secure payment of the underlying obligation.

Creditors and Bankers do not mention the precedential nature of Letter 377 in discussing whether this Court's decision is to be retroactively applied. Yet it is this Letter as well as case authority which yields the conclusion that this is not an issue of first impression and that the Seventh Circuit's opinion was clearly foreshadowed well before the date of the contract between Consumers and Creditors. If the Act and Regulation were not clear enough, Creditors had notice as early as 1970 that the interest was to be disclosed.

Finally, Ford Motor Credit Company is personally in no position to now claim surprise at the conclusion that this assignment is a security interest. In 1976, in the District Court proceedings in *Edmondson v. Allen-Russell Ford, Inc., supra*, Ford Credit admitted that this assignment provision created a

security interest.[13] Ford Credit should not be allowed to deny knowledge of that which it once admitted. If that admission could have been made to the court, then Ford Credit should have been able to admit this to itself and make the necessary improvements in its form disclosure statement.

Since as early as 1970 Creditors have had notice that the assignment clause at issue creates a security interest by virtue of the Regulation Z definition itself and particularly by FRB Letter No. 377. In addition, Ford Motor Credit Company formally and personally recognized this conclusion in 1976. Since that time, the overwhelming weight of judicial authority has continued to reaffirm that judgment. Creditors can show no past precedent on which they have in good faith relied; and rather than deciding "an issue of first impression whose resolution was not clearly foreshadowed," one can only conclude to the contrary that existing authority mandates affirmance of the decision below.

2. CREDITORS HAVE FAILED TO DEMONSTRATE RELIANCE ON CLEAR PAST PRECEDENT.

At the time of the instant transaction on September 30, 1977, there was no clear past precedent supporting Creditors' position on which they could have relied, as discussed in the

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13 See *Shanks* v. *Greenbriar Dodge, Inc.*, No. C75-1154 (N.D.Ga. 1976), Withdrawal of Recommendation, of October 27, 1976 and Magistrate's Report and Recommendation, of December 10, 1976.

preceding section.[14] Reliance requires knowledge of the fact relied upon.[15] The record here is silent as to whether Creditors even knew in 1977 of the split in the district courts. However, it is clear that Ford Credit knew of the authority contrary to its position since it was a party to the *Edmondson* case. Certainly Ford Credit must be charged with knowledge of Letter No. 377 unless it failed to exercise minimum good faith efforts to apprise itself of the published Public Information Letters of the FRB.[16]

Creditors have referred to *McDaniel* v. *Fulton National Bank*, 571 F.2d 948 (5th Cir. 1978), as an example of proper prospective only application of a decision under the Act.[17] In *McDaniel*, the Fifth Circuit, sitting *en banc*, specifically

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[14] The state of the law then was a split among FRB Letter No. 377 and three District Court decisions. *Edmondson* v. *Allen-Russell Ford, Inc.*, *supra*, *Gennuso* v. *Commercial Bank and Trust Co.*, 425 F.Supp. 461 (W.D.Pa. 1976) *rev'd* 566 F.2d 437 (3rd Cir. 1977); and *Shanks* v. *Greenbriar Dodge, Inc.*, Civ. No. C75-1154A (N.D.Ga. 1976), *rev'd* 577 F.2d 296 (5th Cir. 1978). Surely, Creditors can find no *clear* precedent for its position from those authorities, and in fact by virtue of a pronouncement by the staff of the Federal Reserve Board, the weight of authority at that time in fact required disclosure of the assignment clause. See *Ford Motor Credit Company* v. *Milhollin*, *supra*.

[15] See *Travis* v. *Trust Company Bank*, 621 F.2d 148 (5th Cir. 1980).

[16] See *Mirabal* v. *General Motors Acceptance Corp.*, 537 F.2d 871, 879, fn. 13 (7th Cir. 1976); and *Hillers* v. *Local Federal Savings and Loan Association*, 204 Okla. 615, 618, 232 P.2d 626, 630 (1951).

[17] Brief of Creditors, p. 43.

overruled a prior panel decision of that Circuit which had not required a certain disclosure. *McDaniel*, in ordering conformance with an FRB Staff Interpretation, reversed the prior opinion.

McDaniel, however, is not the only Fifth Circuit pronouncement concerning prospective only application of a Truth-in-Lending Act decision. Creditors and Bankers omit from their Briefs any reference to the later Fifth Circuit case of *Travis v. Trust Company Bank, supra.* There, the Fifth Circuit refused to apply an earlier Truth-in-Lending decision prospectively only, reasoning that the sole district court decision, the creditor's "so-called 'clear past precedent' " which was later overruled, was issued months after the credit transaction, and thus the creditor could not and did not rely on it. 621 F.2d at 150.

The particular circumstances in *McDaniel* present a compelling reason to order prospective only application of that decision within that Circuit. But *McDaniel* is inapposite to this case since no precedent from a Circuit Court of Appeals ever favored creditors until just last June when the Tenth Circuit created the present split in the Circuits on this issue.[18] Even *Travis*, which does not support Creditors, is dis-

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[18] *James v. Ford Motor Credit Company, supra.* Five Circuits have ruled on this issue, and of the fifteen judges who sat on those panels, only two have sustained Creditors' position. Those two judges, however, formed the majority of the split opinion in *James*. Since June 1980, six judges from two separate Circuit Court opinions have examined this issue and all six have specifically rejected the *James* majority and have ruled that the assignment creates a security interest which (Cont.)

tinguishable from the present case since in *Travis* there had been a time when the sole precedent on the issue had favored the creditor position. In this case, there has never existed "clear past precedent" to support Creditors, and Creditors in any event do not claim and have not shown that they relied on any authority whatsoever.

3. CREDITORS HAVE FAILED TO DEMONSTRATE THAT FULL RETROACTIVE APPLICATION WILL IMPEDE THE OPERATION OF THE ACT.

The second *Chevron Oil* factor is that a court considering prospective only application must weigh the merits and demerits of each case by determining whether the purpose of the underlying rule would benefit from a limited application. This burden must fall on Creditors, the party seeking the exceptional application.[19]

The Truth-in-Lending Act was enacted as a result of Congressional recognition that consumers were in a disparate bargaining position with creditors. Information important as a tool in shopping for credit and understanding one's obliga-

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[18] (Cont. from page 14)
must be disclosed. *Murphy v. Ford Motor Credit Company, supra,* and *Souife v. First National Bank of Commerce,* 628 F.2d 480 (5th Cir. 1980), *pet. for reh. en banc pend.*

[19] See *Murphy v. Ford Motor Credit Company, supra,* 629 F.2d at 561.

tions was not being disclosed by creditors.[20] The Act sought to correct the disparity by requiring that certain information be disclosed to the consumer in a certain manner. Importantly, consumers were encouraged to enforce the Act both as a method of receiving compensation for their own damages and as a method of forcing creditor compliance with the dictates of the Act. The effectiveness of the Act hinges on private enforcement.

Both Creditors and Bankers argue that retroactive application will not further the purposes of the Act. As stated previously, the necessity of making the disclosure which is the subject of this case had been foreshadowed, yet Creditors ignored this requirement and refused to make that disclosure. Creditors were not deterred from making their faulty disclosures by either the Federal Reserve Board's opinion in 1970 or later opinions of circuit courts. Prospective only application would in fact serve as an incentive to creditors to not comply with their obligations under the Act.[21] Only by ap-

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[20] The Act was passed by Congress in 1968 in response to its determination that "the American consumer [should]be given the information he needs to compare the cost of credit and to make the best informed decision on the use of credit." *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 364 (1973), quoting HR Rep. No. 1040, 90th Cong., 1st Sess., N. 18, at 13, *reprinted in* (1968) U.S. Code Cong. & Ad. News 1962; see also the Act, 15 U.S.C. Sec. 1602.

[21] The remedial purpose of the Act was recognized by this Court in *Mourning v. Family Publications Service, Inc., supra*, 411 U.S. at 364-365 and by Congress, 15 U.S.C. Sec. 1602. The position urged by Creditors to eliminate the statutory remedy is antithetical to this purpose. See *Starks v. Orleans Motors, Inc.*, 372 F.Supp. 928, 931-932 (E.D.La. 1974) ("Where (Cont.)

plying this Court's decision retroactively will these and other creditors be deterred in the future from ignoring the pronouncements of the courts and administrative agency.

The role of the Federal Reserve Board within the entire statutory scheme was intended to be and has become central.[22] Just last term, this Court confirmed that role in *Ford Motor Credit Company* v. *Milhollin, supra,* in which it ordered deference to FRB staff opinions "[u]nless demonstrably irrational." 444 U.S. at 565.[23] To now allow Creditors to disregard those opinions and to escape the consequences of the private enforcement mechanism would signal the consumer credit industry that the Act and the Federal Reserve Board, not to mention last term's pronouncement by this Court, are to be ignored.

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[21] (Contd. from page 16)
the nature of an act is remedial, as here, it should be construed liberally in an attempt to provide the remedy, not avoid it.")

[22] See 15 U.S.C. Sec. 1604, and *Mourning* v. *Family Publications Service, Inc., supra.*

[23] The deference in *Milhollin* was to an official staff opinion. Letter No. 377 is an unofficial opinion. This Court made no distinction in its holding between the two types of opinions, and the one Circuit Court of Appeals to address the issue specifically applied it to unofficial opinions. *Montoya* v. *Postal Credit Union,* 630 F.2d 745, 747 (10th Cir. 1980). Indeed, the rationale underlying the *Milhollin* decision - uniformity of disclosure and staff expertise - is equally applicable to official as well as unofficial opinions.

The deterrent aspect of the Act's private enforcement mechanism is the most important non-disclosure provision of the Act. The Congressional intent would be thwarted if this deterrent is diluted by a limited application of a favorable judgment by this Court. The conduct of Creditors is proof of this proposition.

Bankers further argue that this Court's decision should be applied prospectively only because the damages provided are not corrective but "prophylactic" in nature. This new "element" introduced by Bankers is not considered by *Chevron Oil*, but had it been, Bankers' position would still be incorrect. No showing of actual damages under the Act is necessary to trigger the application of the damages clause.[24] Proving actual damages was not required by Congress for several reasons: Actual damages were inherent in a faulty disclosure, historically actual damages were nearly impossible to prove, and without such provision, there would be no effective enforcement of the Act. Thus, the damage provision contained in the Act does remedy the wrongs of the creditor and redress the injuries suffered by the consumer.[25] A favorable decision by this Court must be made fully retroactive to insure enforcement of the underlying purposes of the Act.

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[24] 15 U.S.C. Sec. 1640(a).

[25] See footnote 21, *supra*.

4. THE EQUITIES INVOLVED WEIGH IN FAVOR OF FULL RETROACTIVE APPLICATION.

The final factor to be considered under the *Chevron Oil* analysis is whether the equities involved would support prospective only application of this Court's judgment. As stated earlier, all three *Chevron Oil* factors must be satisfied to support limited application of a judgment. Since neither of the other two factors have been met by Creditors or Bankers, it should not be necessary to consider the equities. However, based upon the equitable considerations alone, this Court should not apply its decision prospectively only.

a. CONGRESS AND THE BOARD HAVE PROVIDED EQUITABLE METHODS FOR CREDITOR COMPLIANCE.

Congress and the Board have recognized implicitly that a creditor might have difficulty determining in advance which disclosures should be made under the Truth-in-Lending Act. Several methods which could have been employed by Creditors to insure compliance were provided as part of the statutory scheme, but none was used.

15 U.S.C. Sec. 1640(b) provides that any creditor who becomes aware that its disclosures violate the Act can correct those disclosures by notifying its debtor in writing of the mistake within 15 days and thereby can avoid any liability.[26]

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[26] 15 U.S.C. Sec. 1640(b) states:

(b) A creditor has no liability under this section for any failure to comply with any requirement im-

(Cont.)

Creditors here could have availed themselves of this measure and would have been fully protected had they chosen to so notify their customers. Rather, Creditors knowingly gambled that they would ultimately be proved correct, knowing full well the risk they were taking. Creditors would now have Consumers absorb the cost of the Creditors' conscious gamble.

Also provided as a method for a creditor to cross-check its disclosures is the opportunity, if a creditor has a question, to request an interpretation from the Board.[27] The Board's interpretation, when complied with by the creditor, would then form the basis for the defense set forth in 15 U.S.C. Sec. 1640(f)[28] as well as for the protection provided by *Ford*

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[26] (Cont. from page 19)
posed under this part or part E of this subchapter if within fifteen days after discovering an error, and prior to the institution of an action under this section or the receipt of written notice of the error, the creditor notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to insure that the person will not be required to pay a charge in excess of the amount or percentage rate actually disclosed.

[27] 12 C.F.R. Sec. 226.1(d).

[28] 15 U.S.C. Sec. 1640(f) states:
(f) No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board
(Cont.)

Motor Credit Company v. *Milhollin, supra.* A creditor who relies in good faith on such a pronouncement of the Board or its staff is not liable for a violation subsequently established in spite of the pronouncement.

Creditors here have never requested such an interpretation. On July 31, 1980, a creditors' group did make such a request, but the request came *after* the decision of four Circuit Courts of Appeals in *Edmondson, Shanks, Gennuso,* and *James,* [29] and even after the Petition for Certiorari in this case had been filed with this Court. An interpretation requested this late in the development of the present issue could not possibly support a claim of good faith.

The availability of the procedure to request an FRB interpretation belies the argument made by Bankers that prospective only application is appropriate because a creditor has

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[28] (Cont. from page 20)
may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

[29] *Edmondson* v. *Allen-Russell Ford, Inc.*, 577 F.2d 291 (5th Cir. 1978) *cert. denied*, 441 U.S. 951 (1979); *Shanks* v. *Greenbriar Dodge, Inc.*, 577 F.2d 296 (5th Cir. 1978); *Gennuso* v. *Commercial Bank and Trust Co.*, 425 F.Supp. 461 (W.D.Pa. 1976), *rev'd*, 566 F.2d 437 (3rd Cir. 1977); and *James* v. *Ford Motor Credit Co.*, Civ. No. 78-1806 (10th Cir.), *reh. denied* (10th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3333 (U.S. Oct. 20, 1980) (No. 80-640).

only two choices once it suspects a violation of the Act: "(a) to accede to the position urged by his opponents or (b) to litigate and face the risk of truly staggering penalties if unsuccessful at the end of the day."[30] Bankers urge that limited application allows "creditors to present their positions to the courts without intimidation."[31] To the contrary, the third option of seeking an interpretation eliminates any risk and does so without requiring an abandonment of the creditor's right to continue to litigate in the courts.[32]

Creditors have chosen not to take advantage of the methods specifically provided by Congress and the Board to relieve them of liability and risk, and now are in no position to complain that their gamble lost.

b. CREDITORS' CONSCIOUS BUSINESS DECISION WILL NOT CAUSE UNDUE HARDSHIP

After Creditors learned of the various circuit court opinions on this issue, they continued to employ the same form contract with the same clause that had been found to violate

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30 Brief of Bankers, p. 28.

31 *Id.*

32 If the FRB interpretation is unfavorable, the creditor avoids "staggering penalties" by correcting the error pursuant to 15 U.S.C. Sec. 1640(b). As to the customer who has brought the error to the creditor's attention, the right to correct is generally not available, but the liability owing to him is modest and fully consistent with the Congressional intent that consumers be the moving force in assuring compliance.

the Act.[33] The Court below termed this failure to comply with the circuit court opinions a "conscious business decision," stating in a footnote as follows:

> As plaintiffs point out, defendants are not in an ideal position to claim that retroactive application of our ruling will cause undue hardship. Ford Motor Credit was a defendant in the *Edmondson* litigation. Ford learned on July 28, 1978, when *Edmondson* was decided by the Fifth Circuit, that at least one court of appeals considered its failure to disclose an assignment of unearned insurance premiums as a security interest a violation of the TILA. Despite this decision, Ford continued to use, in other circuits, a form contract which had been held to violate the Act in the Fifth Circuit. Ford was certainly entitled to do so since *Edmondson* was not the law in other circuits. However, in doing so Ford was gambling that its view of the law would prevail over the *Edmondson* view in subsequent suits. The fact that Ford now faces the consequences of losing its conscious gamble hardly presents a case of inequitable hardship .... The *Chevron Oil* doctrine is not directed at insulation of litigants from the consequences of their conscious business decisions; rather, its purpose is to avoid the hardship which can result from retroactive application of the decisions which represent sudden, unexpected shifts in the law. This is not such a case.

617 F.2d at 1290, n. 16.

Not only did Creditors fail to conform to decisions from United States Circuit Courts of Appeals, but they also consciously failed to heed the advice of FRB Letter No. 377. If Creditors honestly believed that the difference between life

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[33] In New Mexico, for example, Ford Motor Credit Company continued to use the form disclosure statement with the identical assignment clause on the reverse side until the summer of 1979.

insurance and property insurance or between ownership and assignment (the difference between Letter No. 377 and the instant case) is of any moment, then they should have requested an interpretation in 1970 pursuant to Sec. 226.1(d) of Regulation Z at least on that narrow question; but they did not. Now Creditors are in the anomalous and contradictory position of claiming undue hardship when they seek to avoid the liability which they have consciously incurred.

c. THE TRUTH IN LENDING SIMPLIFICATION ACT DOES NOT ESTABLISH CREDITORS' GOOD FAITH

Creditors and Bankers argue that the Truth in Lending Simplification and Reform Act[34] (hereinafter "TIL Simplification") has vindicated their position and thus mitigates in favor of prospective only application.

TIL Simplification does not affect the assignment in question in any manner whatsoever: Congress did not intend to explain or clarify the existing law but to alter it.[35] However, if the Court finds TIL Simplification relevant, as pointed out by Creditors and Bankers, the new law is not effective until 1982. Thus, Creditors cannot point to TIL Simplification in an attempt to establish good faith. Good faith is a state of mind which must exist when the position is taken. Creditor's contract with Consumers was written in 1977, and TIL Simpli-

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[34] Truth in Lending Simplification and Reform Act, Pub.L. No. 96-221, Title VI, 94 Stat. 168.

[35] See Petition for Writ of Certiorari filed in *James v. Ford Motor Credit Co.*, *supra*, Sec. III, p. 19.

fication was not enacted until 1980 and does not become effective until 1982. Creditors cannot now point to the new law in an attempt to relieve themselves from their liability.

d. SUMMARY

Based on a consideration of all equities involved, Creditors cannot now claim that they should be granted prospective only application of the judgment of this Court. Creditors had several opportunities to correct their disclosures but rather chose at each stage to gamble. They realized that they were exposing themselves to liability. Yet now they would have this Court grant them the benefit of their gamble, to the detriment of the numerous consumers involved. Creditors can show no equities in their favor on this issue and, in those instances where they ignored actual notice that their disclosure statement was defective, may in fact have acted affirmatively in bad faith.

C. IF THIS COURT FINDS A VIOLATION OF THE ACT AND DETERMINES THAT ITS JUDGMENT IS TO BE APPLIED PROSPECTIVELY ONLY, THAT JUDGMENT SHOULD BE MADE APPLICABLE TO ALL PRESENTLY PENDING LAWSUITS ON THIS ISSUE

If this Court does find that Creditors have violated the Act but, contrary to the above, determines that the exception of prospective only application is appropriate, the Court should also make its decision applicable to all cases alleging this violation which are pending on the date of the Court's decision,

or which could be brought within the applicable one year statute of limitations under the Act.[36]

There are several separate and distinct approaches to the grant of prospective relief which have been taken by this Court: (1) prospective application allowing retroactive application only to the parties before the Court:[37] (2) prospective application generally but granting retroactive application to the parties and to all pending actions;[38] (3) prospective application generally but granting retroactive application to the parties, to all pending actions and to all actions which could be brought within the applicable statute of limitations;[39] and (4) application to all pending cases including cases in which

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[36] See 15 U.S.C. Sec. 1640(e): All affirmative actions under the Act must be brought within one year after the date of the transaction.

[37] *Foster* v. *California*, 394 U.S. 440 (1969); *Desist* v. *United States*, 394 U.S. 244 (1969); *DeStefano* v. *Woods*, 392 U.S. 631 (1968); and *Stovall* v. *Denno*, 388 U.S. 293 (1967).

[38] *Hamling* v. *United States*, 418 U.S. 87 *reh. denied* 419 U.S. 885 (1974); *Miller* v. *California*, 413 U.S. 15 *reh. denied* 414 U.S. 881 (1973); *Angelet* v. *Fay*, 381 U.S. 654 (1965); *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Oklahoma Packing Co.* v. *Oklahoma Gas and Electric Co.*, 309 U.S. 4 (1939); *Sioux County* v. *National Security Bank*, 276 U.S. 238 (1928); and *Kibbe* v. *Ditto*, 93 U.S. 674 (1876). See also *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406 (1966) at fn. 3, p. 409, discussing the application of *Griffin* v. *California*, 380 U.S. 609 (1965), to pending cases such as *O'Connor* v. *Ohio*, 382 U.S. 286 (1965).

[39] *Cipriano* v. *Houma*, 395 U.S. 701, 706 (1969).

final judgments have been entered.[40] Most of those cases concern criminal law, yet this Court has recognized that the approaches are equally applicable to civil actions.[41]

As early as 1801 in *United States* v. *Schooner Peggy, supra,* as cited in *Linkletter* v. *Walker, supra,* [42] it was recognized that retroactive application to all presently pending cases was an acceptable method for the implementation of a judicial decision. In *Cipriano* v. *Houma,* citing *Linkletter,* the judgment was applied to all presently pending cases and to those which could still be brought within the applicable statute of limitations. By such application, gross inequities to other litigants would be avoided.

Creditors ask this Court to apply a decision favorable to Consumers prospectively only except as to these Plaintiffs.[43] Bankers suggest an even more unusual approach: They suggest prospective only application in this case, but that the Court

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40 *Amicus* does not suggest that this application to final judgments be made in the present case. In criminal cases collateral attack through a Writ of Habeas Corpus exists as a remedy for implementing new judicial decisions while no such possibility exists in a civil action. For a list of cases employing this method of prospective application, see generally Annotation, 22 L.Ed. 2d 821 at 843, Sec. 5(d).

41 See *Linkletter* v. *Walker, supra,* 381 U.S. at 627 (1965), citing *United States* v. *Schooner Peggy,* 1 Cranch 103, 2 L.Ed. 49 (1801); *James* v. *United States,* 366 U.S. 213 (1961); and *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U.S. 371 (1940).

42 381 U.S. at 627.

43 Brief of the Petitioners, p. 35.

should rewrite the Act to allow retroactive application in cases of "actual harm."[44] Other cases are pending in the courts of this country on the identical issue presented here, including a case in which a Petition for Writ of Certiorari has been filed with this Court.[45] Only because judicial machinery in different United States District and Circuit Courts operates at different rates is this particular case before the Court rather than any of the other cases. Yet Creditors arbitrarily only want Consumers in the present case to benefit from a favorable decision. Other consumers across the country who have sought or could still seek to enforce their rights under the Truth-in-Lending Act would be denied the benefit of a decision which vindicates their claim to relief as mandated by the Congressional policy of private enforcement.

The unfairness of such an application is obvious. Creditors and Bankers are not concerned with fair play and equity unless it would serve to relieve them of liability. No evidence has been presented and no argument made that would justify application of this Court's judgment only to Ms. Valencia and Mr. Gonzales to the detriment of all other similarly situated consumers whose cases are pending or could properly be pending in the courts of this country.

Amicus urges that even if the judgment of this Court is applied prospectively only, its application be made retroac-

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[44] Brief of Bankers, p. 26.

[45] *James v. Ford Motor Credit Co., supra.*

tive to these Consumers, to all other consumers whose cases are presently pending, and to those consumers whose cases could still be brought within the applicable statute of limitations.

II. CONCLUSION

Creditors and Bankers argue for prospective only application of a judgment by this Court which finds that Creditors have violated the Truth-in-Lending Act. Under the *Chevron Oil* test, Creditors have satisfied none of the three factors which are required for prospective only application, and the judgment of this Court must be given full retroactive application as discussed herein.

Amicus respectfully urges this Court to grant full retroactive application of its judgment or, in the alternative, to hold its judgment applicable to the parties in the present case, to all other cases now pending in the courts of this country, and to those cases which could still be brought within the applicable statute of limitations.

Respectfully submitted,

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February 25, 1981

FEDERAL RESERVE BOARD
PUBLIC INFORMATION LETTER NO. 377

Sec.	226.4(a) 226.8(b) 226.8(c)	Proceeds of loan used to purchase insurance

July 22, 1970

As we understand the proposed plan, your client proposes to place literature in its loan offices concerning insurance to be sold by a company unrelated to your client. Applications for a single premium lifetime accidental death and dismemberment policy are available in each office and if a customer desires to purchase such a policy with the proceeds of his loan, a check will be sent directly to the company from your client in payment of the premium. While your client will not require the purchase of this insurance and the proceeds of the policy would in no circumstances be used to pay any portion of an unpaid balance of the loan, your client would be designated as the owner of the policy during the term of the loan. In the event of the customer's default, your client would have the right to cancel the policy and apply any premium refund to the unpaid balance of the loan.

Under the circumstances, we think it would be appropriate to disclose the loan company's ownership of the policy as a type of "security interest" under Sec. 226.8(b)(5) and disclosure need not be made under Sec. 226.4(a)(5). The amount of the premium would not be included in the "finance charge" nor would it be disclosed as an "other charge."

Tynan Smith
Assistant Director